

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

17-2150, 17-2151

To be argued by
GERALD RYAN

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES ex rel. LARRY C.
MOSLEY,

Appellant,

-against-

ERNEST L. MONTANYE, Superintendent,
Attica Correctional Facility,

-----X

UNITED STATES ex rel. DORIS McNAIR,

Appellant,

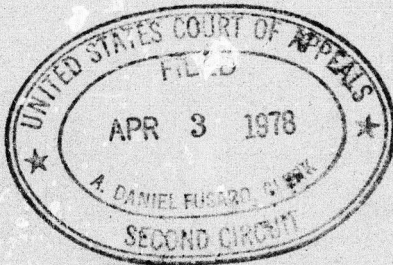
-against-

FRANCES CLEMENT, Acting Superintendent,
Bedford Hills Correctional
Facility,

Respondent.

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BRIEF FOR RESPONDENTS-APPELLEES



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BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court, Western District of New York (Burke, J.) entered June 23, 1977 dismissing the appellants' habeas corpus petitions.

Questions Presented

1. Whether the sentences prescribed by New York State in mandating life imprisonment for certain "drug law" offenses are so disproportionate as would constitute cruel and inhuman punishment in violation of the United States Constitution?

2. Whether petitioner's failure to take an appeal to the Supreme Court of the United States from the decision of the New York Court of Appeals upholding the constitutionality of the statute challenged herein constitutes a waiver sufficient to bar habeas corpus relief?

Prior Proceedings

Petitioner-appellant Larry C. Mosley was charged with the class A felony of criminal sale of a dangerous drug (heroin) in the 3rd degree under former N.Y. Penal Law (P.L.) § 220.35 and § 20.00 by Indictment No. 664, filed by the Monroe County Grand Jury on November 16, 1973, and with the class A-III felony of criminal sale of a controlled substance (heroin) in the 3rd degree under P.L. § 220.39(1) by Indictment No. 84, filed by the Monroe County Grand Jury on February 8, 1974.

On July 19, 1974, the petitioner pleaded guilty to Indictment No. 84 under the new law in satisfaction of both indictments.

By an information signed by Monroe County District Attorney Jack B. Lazarus on September 6, 1974, the petitioner was charged with having previously been convicted of the felony of grand larceny in the 3rd degree on July 9, 1970.

Ultimately, Mosely was resentenced on remand to an indeterminate term of one year to life, based on the aforementioned plea.

Appellant McNair was convicted in the Monroe County Court, New York after a jury trial of the class A-II felony of criminal possession of a controlled substance (heroin) in the 3rd degree, under N.Y. Penal Law § 220.18, and the class A misdemeanor of criminal use of drug paraphernalia (2 counts) under Penal Law § 220.50, and criminal possession of a hypodermic instrument under Penal Law § 220.45, and was sentenced to concurrent terms of 6 years to life on the felony and one year each on the misdemeanors.

By an opinion filed January 16, 1975, reported sub nom., People v. McNair, 46 A D 2d 476, 363 N.Y.S. 2d 151 (4th Dept., 1975), the Appellate Division for the Fourth

Department unanimously reversed the petitioner Mosely's 3 to 6 year sentence and remitted for resentencing, and unanimously affirmed the petitioner McNair's sentence.

By an opinion filed June 18, 1975, reported sub nom., People v. Broadie, 37 N Y 2d 100, 371 N.Y.S. 2d 471 (1975), the New York Court of Appeals unanimously affirmed the orders of the Appellate Division. By petitions sworn to on July 18 and 16, 1975, respectively, the petitioners Mosely and McNair applied to the U.S. District Court for the Western District, of New York for writs of habeas corpus to challenge the constitutionality of the New York State classification and sentencing provisions for the sale and possession of heroin.

U.S. District Court Judge Harold P. Burke signed show cause orders on October 6 and 9, 1975, entered October 8 and 10, 1975, for Mosely and McNair, respectively.

By an order signed by Judge Burke on June 22, 1977, entered June 23, 1977, and a judgment made and entered June 23, 1977, the petitions for writs of habeas corpus were denied.

By an order signed by Judge Burke on July 22, 1977, entered July 25, 1977, the district court denied the appellants' application for a certificate of probable cause and denied permission to appeal in forma pauperis, with the qualification

that they could file a notice of appeal without the payment of filing fees, and without prejudice to applying to this Court for the same relief.

POINT I

THE SENTENCES PRESCRIBED BY THE
NEW YORK STATE LEGISLATURE FOR
DRUG CRIMES ARE IN ALL RESPECTS
CONSTITUTIONAL AND VALID.

The classification of particular acts as criminal and the designation of the degree of criminality that should attach to such acts are preogatives of the State Legislature. Prescribing certain conduct as criminal and prescribing punishment for such conduct are fundamental and inherent powers of the State Legislature. E.g., Pennsylvania v. Ashe, 302 U.S. 51 (1937); Whipple v. Martinson, 256 U.S. 41 (1921); Weems v. United States, 217 U.S. 349, 379 (1910); United States ex rel. Daneff v. Henderson, 501 F. 2d 1180 (2d Cir., 1974).

"The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the State's] determination. Collins v. Johnston, 237 U.S. 502, 510 (1915); Howard v. Fleming, 191 U.S. 126, 135-136 (1903). It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes." Pennsylvania v. Ashe, supra at 55.

The same point was made by Justice Douglas, speaking for the Court in Skinner v. Oklahoma, 316 U.S. 535 (1942):

"Under our constitutional system, the states in determining the reach and scope of particular legislation need not provide 'abstract symmetry'. They may make and set apart the classes and types of problems according to the needs and as dictated or suggested by experience... A state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment." (316 U.S. at 539-540) (dicta).

The Court had earlier noted:

"That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Under leniency in one case does not transform a reasonable punishment in another case to a cruel one." Howard v. Fleming, 191 U.S. 126, 135-136 (1903).

"The power of punishment is vested in the Legislature, not in the judicial department. It is the Legislature, not the court, which is to define the crime and ordain its punishment." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 93 (1820).

This power includes the broad power to regulate drug traffic within state borders.

"The broad power of a state to regulate the narcotic traffic within its borders is not here in issue. More than forty years ago in Whipple v. Martinson, 256 U.S. 41, this Court explicitly recognized the validity of that power. 'There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs... The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question'. 256 U.S. at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A state might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession within its borders.... In short, the range of valid choice which a state might make is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide." Robinson v. California, 370 U.S. 660, 664-665 (1962).

The exercise of this legislative power to define crimes and to establish punishments therefore, is however subject to judicial scrutiny to ensure that it does not transgress any constitutional prohibitions. Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86 (1958).

However, that judicial power is not unrestrained. The United States Supreme Court emphasized this caution in Gregg v. Georgia, 428 U.S. 153 (1976) at 174-6 when it observed:

"But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures'. Dennis v. United States, 341 U.S. 494, 525, 95 L.Ed 1137, 71 S.Ct. 857 (1951) (Frankfurter, J., concurring in affirmance of judgment).*

Therefore, in assessing a punishment selected by a democratically elected Legislature against the constitutional measure, we presume its validity. We

* See also Furman v. Georgia, *supra*, at 411, 33 L.Ed 2d 346, 92 S.Ct. 2726 (Blackmun, J., dissenting):

"We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great."

may not require the Legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people'. Furman v. Georgia, supra, at 383, 33 L.Ed 2d 346, 92 S.Ct. 2726 (Berger, C.J., dissenting). The deference we owe to the decisions of the state Legislatures under our federal system, id., at 465-470, 33 L.Ed 2d 346, 92 S.Ct. 2726 (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'. Gore v. United States, 357 U.S. 386, 393, 2 L.Ed 2d 1405, 78 S.Ct. 1280 (1958). Cf Robinson v. California, 370 U.S. at 664-665, 8 L.Ed 2d 758, 82 S.Ct. 1417; Trop v. Dulles, 356 U.S. at 103, 2 L.Ed 2d 630, 78 S.Ct. 590 (plurality opinion); In re Kemmler, 136 U.S. at 436 at 447 (1890), 34 L.Ed 519, 10 S.Ct. 930. Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility. . . . throughout the country'.

Powell v. Texas, 392 U.S. 514 (1968).
A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. See Furman v. Georgia, supra, at 461-462, 33 L.Ed 2d 346, 92 S.Ct. 2726 (Powell, J., dissenting)."

A review of the cases that have addressed the problem of 8th Amendment limitations on power of state Legislature bodies dictate that a number of considerations must be weighed in determining what punishment is considered cruel and unusual.

In Furman (supra) Justice Brennan set out four principles in his concurring opinion which he asserted must be applied to determine that, i.e. the punishment comport with the dignity of man; it must not arbitrarily inflict severe punishment; it must not be unacceptable to contemporary society and must not be excessive so as to amount to a pointless infliction of suffering (disproportional).

In determining whether these principles have been violated, other cases have outlined specific areas of inquiry which may be used as measuring standards. Hart v. Coiner, 483 F. 2d 136 (4th Cir., 1973), cert. den. 415 U.S. 983 (1974) and In re Lynch, 503 Pd 921 (Cal. 1972) (both of which emphasized the element of disproportionality). In other cases reliance was placed on whether violence was involved. Hart (supra). Still others stressed the degree of danger which the offense and the offenders present to society. In re Lynch, 503 P. 2d 921 (1972).

In Hart (supra) the appellee in a habeas corpus proceeding was sentenced to life imprisonment as a recidivist. The recidivist charge against Hart was based upon a perjury conviction and two prior convictions - one in 1949 for writing a check on insufficient funds for \$50, and one in 1955 for interstate transportation of forged checks worth \$140.

The perjury charge arose out of testimony given by Hart at the murder trial of his son which the court found was a product more of family loyalty rather than evil intent.

The court also found that none of Hart's offenses were against the person. None involved violence or danger of violence toward persons or property. The bad check case was very "nearly trivial" - one penny less in the face amount of the check and the offense would have been a five-to-sixty day petty misdemeanor and that the offenses involved were of those that ranked relatively low in the hierarchy of crimes.

In Re Lynch (supra) the court was dealing with a matter that involved a prescription of a life sentence for the second offense of indecent exposure. A single commission of the act was no more than a misdemeanor punishable by a brief jail sentence or a small fine. There was a total absence of violence, harm to society, and such punishment as it turned out was contrary to legislative purpose.

The latest case upon which the petitioners-appellants place reliance involved the imposition of the death penalty for the rape of an adult. Coker v. Georgia, 45 U.S.L.W. 4961 (1977). In that opinion, the court found such punishment was a disproportionate penalty. Although the court considered several factors in reaching its determination it buttressed its conclusion on two main elements: Firstly, the death penalty is unique in its severity and irrevocability and secondly, that

although rape is a serious crime it did not involve the taking of a life (emphasis supplied).

What must weigh heavily in the instant case is the motivation of the Legislature in enacting the present statute and the societal problems confronting the state.

In his Annual Message to the Legislature on January 3, 1973, Governor Rockefeller observed: "The number one, growing concern of the American people is crime and drugs* * *". (McKinney's Session Laws of New York [1973] Vol. 2, pp. 2317-2322).

The Legislature shared this concern and conducted extensive hearings and investigations into the problem. Based on the facts as the Legislature found them to be, including a very high and very close statistical relationship between crime and drug abuse, a 60% to 65% recidivist rate for felons convicted of drug related crimes, an inadequate response to less severe punishment, and an insidiously growing problem extending from the ghetto to the suburbs and the brothel to the campus,* the Legislature determined that stricter penalties were appropriate.

* Official Transcripts, Joint Senate and Assembly Standing Committee on Codes, Jan., Feb., March 1973, O'Neill Reporting Company, White Plains, New York; Official Transcripts, Senate Debate on Drug Bills (S 6204, S 6205, A 7328, A 7873) April, Mar, 1973 Senate Stenographers, Assembly Debate on Drug Bills (S 6204, S 6204, A 7328, A 7873), May 1973 Assembly Stenographer, State Capital, Albany, New York; Penal Law, Art. 220, Supplementary Practice Commentary by Arnold Hechtman, McKinney's Consolidated Law of New York, 1974-1975 Supplement.

As the Appellate Division, Fourth Department, noted in People v. Mosely and People v. McNair, 46 A D 2d 476 affd. sub nom People v. Broadie, 37 N Y 2d 100 (1975), cert. denied 423 U.S. 950 (1975):

"The drug problem, as it exists today in New York State, needs no citation of authority to establish its pervasive existence. Narcotics addiction, particularly heroin addiction, is undoubtedly one of the most serious social evils confronting American society today."

In proposing the Drug Law of 1973, Governor Rockefeller stated "The only way to deter this commerce in tragedy is by measures so strong, so effective, so fully enforced that the hard drug pusher will no longer risk his own life and freedom by jeopardizing the lives of others". (Annual Message of Governor, McKinney's Session Laws of New York [1973] Vol. 2, pp. 2317-2322).

His comments reflected the intolerably high drug traffic in the City and State of New York. In 1973, the Legislature passed the drug law, which included mandatory indeterminate life sentences as punishment for those convicted of felonies.

"The 1973 revision of the drug law . . . mirrors many of society's current concerns and attitudes about the problems inherent in and created by drug abuse. Frustration with the seeming intractability

of the drug problem is reflected in the hard line approach (taken by the Legislature) to the classification of drug crimes and to tougher and more restrictive sentencing opinions upon conviction." (Supplementary Practice Commentary of Arnold Hechtman, Esq., McKinney's Constitutional Law of New York, Book 39, Penal Law, Art. 220, 1973-1974, supplement, p. 6).

In an unanimous decision, holding the sentences prescribed by the 1973 revision of the drug laws constitutionality valid the New York Court of Appeals noted:

"In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society. The Legislature, in making this assessment, could properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution, is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse (see, generally, President's Comm. on Law Enforcement and the Administration of Justice, Task Force on Narcotics and Drug Abuse [1967], p. 7).

Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes engage in crimes of violence among themselves.

(see, e.g., People v. Medina, 47 A D 2d 717 [two drug pushers upon learning of a dealer's plot to have one kill the other, kill the dealer]).

More significant, of course, are the crimes which drug traffickers engender in others. The seller often introduces the future addict to narcotics. The addict, to meet the seller's price, often turns to crime to 'feed' his habit. Narcotics addicts not only account for a sizable percentage of crimes against property; they commit a significant number of crimes of violence as well (see Task Force on Narcotics and Drug Abuse. op. cit., pp. 10-11; Second Report of the National Comm. on Marijuana and Drug Abuse, Drug Use in America; Problem in Perspective, p. 165; see, generally, Greenberg and Adler, Crime and Addiction; An Empirical Analysis of the Literature, 1920-1973, 3 Contemporary Drug Problems 221).

Thus the Legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime. And violent crime is not, of course, the only destroyer of men and the social fabric. Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers (see, generally, Interim Report of the Temporary State Comm. to Evaluate the Drug Law, NY Legis. Doc. 1972, No. 10, p. 58).

Measured thus by the harm it inflicts upon the addict, and through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank". People v. Broadie, 37 N Y 2d 100, 112-113 (1975), cert. denied 423 U.S. 950 (1975).

Regarding the violence traced to drug abuse two New York courts quoted an observation made in an earlier case:

"More young people in our city [New York] die from drug abuse than from any other single cause." People v. Venable, 46 A D 2d 73, 77 (3d Dept. 1974) affd.; People v. Broadie, *supra*; People v. Junco, 43 A D 2d 265, 268 (1st Dept.), affd. 35 N Y 2d 419 (1974), cert. den. 421 U.S. 951 (1975).*

The exceptionally serious nature of narcotics offenses has been realized by legislative bodies other than the New York State Legislature.

The dissenting opinion to Schick v. Reed, 419 U.S. 256, 275 n. 11 (1974) noted that life imprisonment without the opportunity for parole was unknown to military law and that

"The only federal law recognition of this punishment in a civilian context is found in the very limited no-parole provisions dealing with continuing narcotics enterprises.... Guided by the special nature of drug offenses and drug offenders the Congress enacted this narrow exception to universal eligibility for parole."

* Estimates of the total number of narcotics addicts in the United States vary greatly. In 1971 the National Institute of Mental Health, based on a wide range of data, estimated the addict population in the United States at between 250,000 and 315,000. It is generally conceded that well over half of this population is based in New York City (Licit and Illicit Drugs, by Brecher and the Editor of Consumer Reports-Little, Brown & Co., Boston, 1972, at 72). Latest estimates place the nationwide figure at 725,000 (Newsweek, Feb. 24, 1975, p. 24).

In upholding the validity of a federal statute which prohibited the suspension of sentence or probation in cases of violation of the Narcotics Drugs Import and Export Act together with the imposition on first offenders of a sentence of at least five years nor more than twenty years in addition to a fine of up to \$20,000 a federal court noted:

"In view of the moral degeneration inherent in all aspects of the crime denounced by the Narcotic Act, it cannot be said that the length or severity of the punishment here prescribed is disproportionate to the offense." Gallego v. United States, 276 F. 2d 914, 918 (9th Cir., 1960).

In arriving at this decision the court considered the concerns of Congress as indicated in the Congressional Record which prompted it to find that the elimination of parole for first offenders was necessary. Gallego v. United States, supra at 918, n. 4. Further, the United States Supreme Court has stated:

"We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government." Robinson v. California, supra at 667.

[T]here is a certain subordination of the judiciary to the Legislature, the function of the Legislature is primary, its exercises fortified by presumptions of rights and legality and is not to be

interfered with lightly, nor by any judicial conception of their wisdom or propriety." Weems v. United States, supra at 379.

It is only where it can be unhesitatingly said that the prescribed punishment is clearly and manifestly cruel and unusual that the penalty can be annulled by the court. E.g. Kreiling v. Field, 431 F. 2d 502 (9th Cir., 1970); United States v. Sorcey, 151 F. 2d 899 (7th Cir., 1945), cert. denied 327 U.S. 794; Cooper v. United States, 403 F. 2d 71 (10th Cir., 1968).

The indeterminate life sentences imposed on the petitioners comport with the requirements of the Eighth Amendment.

It is within this context, of the broad power of the state Legislature to determine the gravity of offenses and fix penalties for their commission. The serious nature of narcotics offenses is well recognized by this and other jurisdictions. The extensiveness of narcotic trafficking in New York in particular, is notorious. It is in this context that the constitutional validity of the 1973 revision of New York's drug laws must be considered. Neither the length of the prescribed sentence for Class A felonies nor the fact that the maximum term is mandatory, and that the minimum term of imprisonment must be

set by the court offends the Federal Constitution.* While 1973 revision mandates a maximum term of life imprisonment, it leaves considerable discretion with the court to minimum term which can be as short as one year. Probation without imprisonment is also a possibility in an appropriate case. Penal Law § 65.00(1)(b).

* The New York Court of Appeals in People v. Broadie, supra at 115 briefly summarized the severity of these sentences in relation to sentences for other crimes in New York State. The history and origins of the cruel and unusual punishment clause were explored in an appendix to that opinion. It should be noted that under state law the minimum term of any indeterminate sentence must be at least one year - Penal Law, § 70.00(3). It should further be noted that while for Class B, C, or D felonies, the court may impose a minimum sentence or leave it to be fixed by the State Parole Board, the advantages derived from a court set minimum term has been the subject of litigation. Walker v. Oswald, 449 F. 2d 481 (2d Cir., 1971) (Claim that prisoner was entitled to same due process rights and procedural safeguards at an MPI hearing before Parole Board as one would enjoy if sentenced by court; Rose v. Gross(74 Civ. 3348, S.D.N.Y.) (Challenge to Correction Law § 212(2) on the grounds that it permits the Parole Board to set a minimum term of greater duration than a court is authorized to impose and that the law did not require that the Board credit an inmate's jail time against the minimum while Penal Law § 70.30(3) requires that such time be credited against a minimum term when fixed by a court resulting in earlier parole eligibility for those where minimum are fixed by the Court).

The term "mandatory life sentence" is a misnomer, held over from the original proposal submitted by Governor Rockefeller.* The 1973 drug law authorizes the board of parole to imprison any A felony drug offender for life, but does not require such imprisonment. The law restricts the discretion of the judge to setting the minimum term within ranges,** while it extends extremely broad discretion to correctional authorities as to the actual period of imprisonment, within a range that may include from one year to life.

Under the provisions of the 1973 drug law amendments, any persons convicted of the sale of heroin were to remain subject to parole for the rest of their lives, regardless of age at the time of conviction, prior record, nature of the offense, or evidence of rehabilitation.*** The law was subsequently amended, effective August 11, 1977 to partially

* Message of Governor Rockefeller to the Legislature. McKinney's Sessions Law 2318 (1973). See S-1365, A-1556. The original bill, which was subsequently modified during hearings, called for actual like prison terms.

** The court must impose a maximum life term for any A drug felony. Penal Law § 70.00. The ranges for minimum terms are 1 to 8 years 4 months for an A-III felony, 6 to 8 years 4 months for an A-II felony, and 15-25 years for an A-I felony.

*** Correction Law § 212(8).

eliminate the distinction between Class A drug felons and all other felons, by authorizing discharge from parole after 3 years.*

Petitioner-Appellant McNair was sentenced on April 22, 1974 to a term of six years to life. She was paroled on February 22, 1977 when her sentence was commuted by order of the Governor, after being incarcerated just two months under three years.

Petitioner-Appellant Mosely was sentenced on remand on September 20, 1974 to a term of one year to life and was released on parole on December 16, 1976, after being incarcerated just slightly more than two years.

Imprisonment, even if for mandatory lengthy terms, has historically been upheld by the United States Supreme Court as an entirely proper response to actions of demonstrable criminal magnitude. Schick v. Reed, supra (upholding a sentence of life imprisonment without opportunity for parole while noting that the no parole condition "is similar to sanctions imposed by Legislatures such as mandatory minimum sentences or

* Executive Law § 259-j was amended to eliminate differential treatment of A drug felons. It now reads: If the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interest of society, the board may grant such discharge prior to the expiration of the full maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years. A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted.

statutes otherwise precluding parole; it does not offend the Constitution"); Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86, 101-102 (1958) ("fines, imprisonment and even execution may be imposed depending upon the enormity of the crime"). Indeed the tenor of recent cases is that it is the opportunity for abuse of judicial discretion which renders a sentence cruel and unusual. In Furman v. Georgia, supra, the court invalidated the imposition and execution of a discretionary death sentence. In a concurring opinion Justice Douglas wrote that the Eighth Amendment required state Legislatures to enact laws which are even-handed and non-selective and stated:

"In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."
Supra at 225.

Mandatory sentencing provisions avoid even the appearance of arbitrariness, avoid judicial abuse of discretion, and insure the uniform application of the law to all offenders:

"The degree of disparity from one judge to another is widely regarded as a disgrace to the legal custom." K. Davis, Discretionary Justice (1971) at 133.

In his dissent in Hart (supra) Boreman, SCJ noted at p. 147:

"The sentence to be imposed is mandatory. There is no room for it to be 'applied and administered by public authority with an evil eye and an unequal hand,' nor opportunity for 'unjust and illegal discriminations between persons in similar circumstances'. The statutory requirement that a life sentence be imposed insures uniform application and prevents any abuse of discretion by the trial judge. The only discretion involved is that of the prosecutor in deciding whether to proceed against a particular defendant under the . . . statute . . ."

Davis' book (supra) goes on to quote from Senate Reports, No. 2013, 85th Cong.:

"The existence of wide disparities casts doubt upon the evenhandedness of justice and discourages a respect for the law."

The subject of indeterminate discretionary sentences was explored in an article by Professor Alan Dershowitz which appeared in the N.Y. Times (December 28, 1975) § 6 (Magazine)

at 7. The article concludes that "a surprising consensus is emerging around the idea that it is time for a return to uniformity in sentencing", notes that the results of a recent study commissioned by the United States Court of Appeals for the Second Circuit found great disparities in sentencing among 50 federal judges who were given 20 identical files, and quotes Judge Frankel of the District Court as saying that wide disparities in sentencing are commonly a function "of the wide spectrums of character, bias, neurosis and daily vagary encountered among occupants of the trial bench".

The mandatory sentencing provisions of the new Law escape the vast potential for abuse existing under former Penal Law provisions governing sentencing for drug sale and possession.*

In comparing the laws of other jurisdictions for similar offenses appellants argue that liberal good time or commutation provisions alleviate what appear on their face to be harsh sentencing provision of these jurisdiction (appellants brief pp. 97-102).

* "Our Penal Law philosophy has consistently rejected the notion of unbridled sentencing discretion and, in spite of the difficulty involved in setting up a degree structure, we are committed to attempting to find a rational basis for defining levels of culpability." Interim Report of the Temporary State Commission to Evaluate the Drug Law, Legislative Document (1972) No. 10; p. 59.

The petitioners in the case at bar are examples of how the indeterminate sentencing provisions of the N.Y. Drug law has been implemented.

The Assn. of the Bar of the City of New York Drug Abuse Council, Inc., The Nation's Toughest Drug Law: Evaluating the New York Experience (Final Report of the Joint Committee on New York Drug Law Evaluation) (1977) is cited by petitioners in their brief (pp. 21,132,133). In Chapter "II" entitled "What Accounts for the Disappointing Results of the 1973 Drug Law?", the report's conclusion summarized at p. 87, noted:

Under the new drug law, the risk of incarceration facing a drug offender convicted in superior court increased from 33% in 1972 to about 55% in 1976. However, this large rise was largely offset by other changes which occurred in the adjudication process. The net result was that the risk of incarceration facing persons arrested for a new lawdrug felony remained substantially unchanged from the risk they had faced under the old law. (emphasis added) In 1972 about 11% of felony drug arrests resulted in a prison or jail sentence in superior court; in early 1976, the proportion was an identical 11%.

It is apparent from the conclusions of this study that the allegations of the appellants that the new drug law imposes harsh punishments across a broad spectrum of drug offenses in violation of the Eighth and Fourteenth Amendment is not well founded.

Moreover, as quoted in Schick v. Reed, the imposition of a mandatory term and statutes prohibiting probation, parole and suspended sentences have long been found to be constitutionally valid. Gallego v. United States, supra (Mandatory 5 year minimum for first offense conviction of unlawful importation of marijuana); Halprin v. United States, 295 F. 2d 458 (9th Cir., 1961) (federal prohibition of parole together with variances in sentences which could be imposed under other narcotics law); Hutcherson v. United States, 120 U.S. App. D.C. 274, 345 F. 2d 964 (1965), cert. den. 382 U.S. 894 (1965), 86 S. Ct. 188, 15 L.Ed. 2d 151 (minimum mandatory sentence of 10 years for narcotics violation); Daut v. United States, 405 F. 2d 312 (9th Cir., 1968) (minimum mandatory sentence of 5 years for unlawful importation of marijuana), cert. den. 402 U.S. 945; 91 S. Ct. 1624, 29 L.Ed. 2d 114; United States v. Drotar, 416 F. 2d 914 (5th Cir., 1969) (minimum mandatory sentence of 5 years upon second conviction for possession of marijuana and prohibition of probation or suspension of sentence), vacated on other grounds 402 U.S. 939, 91 S. Ct. 1628, 29 L.Ed. 2d 107; United States v. Del Toro, 426 F. 2d 181 (5th Cir., 1970), cert. den. 400 U.S. 829 (1970), 91 S. Ct. 27 L.Ed. 2d 60 (minimum mandatory sentence of 5 years for first offender convicted of selling heroin); United States v. Lozaw, 427 F. 2d 911 (2d Cir., 1970) (minimum mandatory sentence of 5 years for knowingly concealing

marijuana and conspiring to do so and prohibition of probation and suspension of sentence); United States v. Davila, 428 F. 2d 465 (9th Cir., 1970) (minimum mandatory sentence of 5 years for unlawful importation of marijuana); United States v. Avey, 428 F. 2d 1159 (9th Cir., 1970) (minimum mandatory sentence of 5 years for knowingly concealing marijuana with knowledge it had been unlawfully imported), cert. den. 400 U.S. 903; 27 L.Ed. 2d 139; United States v. Sherman, 430 F. 2d 1402 (9th Cir., 1970) (minimum mandatory sentence of 5 years for illegal concealment and transportation of marijuana), cert. den. 401 U.S. 908, 91 S. Ct. 865, 27 L.Ed. 2d 805, reh. den. 401 U.S. 1015; 91 S. Ct. 1249, 2d L.Ed. 2d 522; Sperling v. Willingham, 353 F. 2d 6, 7 (7th Cir., 1965), cert. den. 384 U.S. 962 (1966); Stewart v. United States, 325 F. 2d 745, 746 (8th Cir.), cert. den. 377 U.S. 937 (1964) (also noting that imprisonment without parole is usual confinement); United States v. Ross, 464 F. 2d 376 (2d Cir., 1972), cert. den. 410 U.S. 990 (1973) (minimum mandatory sentence of 10 years for second offender convicted of selling heroin where sentence was imposed under statute in effect at time crime was committed); State v. Motley, 546 S.W. 2d 435 (Mo. Ct. App. 1976) (minimum mandatory sentence of 10 years for sale of marijuana by defendant having a prior controlled substance felony conviction and prohibition of parole, probation or suspension of sentence); State v. Hall, 227 N.W. 2d

192 (Iowa 1975) (10 year mandatory prison sentence with prohibition of probation or parole for delivery of cocaine); People v. Gonzales, 25 Ill. 2d 235, 184 N.E. 2d 833 (1962), cert. den. 372 U.S. 923 (1963) (mandatory 10 year minimum for first offender convicted of selling marijuana). People v. Jackson, 116 Ill. App. 2d 304, 253 N.E. 2d 527 (1969) (mandatory life sentence for second offender convicted of selling heroin). See also Bradley v. United States, 410 U.S. 605 (1973). In Ingraham v. Wright, 430 U.S. 651 the U.S. Supreme Court at 669, 670 noted:

" . . . the protection afforded by the Eighth Amendment is limited. After incarceration, only the 'unnecessary and wanton infliction of pain,' Estelle v. Gamble, 429 U.S., at 103, quoting Gregg v. Georgia, 428 U.S., at 173, constitutes cruel and unusual punishment forbidden by the Eighth Amendment."

The Second Circuit in United States v. Chow, 398 F. 2d 596 (2d Cir., 1968) had held that the five-year statutory minimum sentence for drug conspiracy mandated by 21 U.S.C. 194 is not cruel and unusual punishment even when applied to a mother with no prior record, and whose 9 year old twins were dependent on her for support:

"Imprisonment, even long imprisonment, has not been regarded as a cruel and unusual punishment. * * * Whatever may be thought as to the disability of mandatory minimum sentences they are far from 'unusual' in this country's penal law" (Citations omitted). 398 F. 2d 598.

Given "the epidemic dimensions of the problems" (People v. Broadie, supra at 117), a mandatory term of life imprisonment is not so grossly disproportionate to the gravity of the offenses as to amount to cruel and unusual punishment. As noted earlier (pp. 408) the scope of the drug problem in New York is immense.*

The Legislature's judgment that a life sentence is a necessary deterrent is not so unreasonable that it should be invalidated by the Court. Lesser penalties have been tried, prior to September 1, 1973, and found wanting. In addition, narcotics-selling presents a difficult deterrence problem, warranting especially severe treatment, because persons willing to sell drugs are capable of earning sizeable sums of money with little effort and without the risks of physical harm that attend the commission of other money-making crimes, such as

* The findings of a six-month investigation by the State Commission on Investigation were reported to be that there are 2,000 patient residents in 12 treatment centers for narcotics addicts in New York State at an average annual cost of \$26,900 per patient. N.Y. Times (January 4, 1976) § 1 p. 26.

robbery and burglary. Deterring the non-addict seller, motivated by greed and faced with the attractive economic realities of the narcotics business, and deterring the addict-seller, who has the added motivation of satisfying his own drug habit may reasonably, in the Legislature's judgment, require a life-sentence.

The Court of Appeals in People v. Broadie, supra at 114-115, examined the penalogical purposes for the imposition of life sentences; isolation and deterrence:

"The reasons for isolating drug traffickers have already been suggested. The Legislature could find that narcotics sellers were the crucial link in the pernicious cycle of drug abuse; that sellers spawn addiction, and that addicts, in turn, may become sellers... The Legislature could conclude that the best way to break the chain would be to remove the seller from society for a long duration, and, upon his return, to continue surveillance through lifetime parole.

Deterrence is the other obvious purpose. It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible and therefore certain, exceptionally severe punishment...."

While commenting on the possibilities of parole and probation following convictions in other jurisdictions, as indicia of those with less severe punishments, the appellants

take the position in evaluating the New York Drug law that it must base its judgment on the maximum term possible given these appellees while at the same time conceding that it is possible and even probable that they will both be released from prison substantially before the expiration of their maximum terms. As noted earlier in fact both appellants are now on parole.

In the Second Circuit when the argument was made by a defendant convicted for selling heroin that a sentence of 20 years without parole was violative of the 3th Amendment as cruel and unusual the court in its rejection found that such a sentence would be reduced by credit for time served and by good time credits earned. United States v. Fiore, 467 F. 2d 86 (2d Cir., 1972), cert. den. 410 U.S. 984 (1973). The court went on and stated in its reference to Furman (supra) that

" . . . while appellant would find some solace in the language of the opinions of Mr. Justice Brennan and Mr. Justice Marshall in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346 (1972), the other opinions there supporting the majority holding, as well as the dissenting opinions, give no support to appellant's claim."

For the reasons stated above the decision of the District Court with respect to the appellants should be affirmed.

POINT II

PETITIONERS' FAILURE TO APPEAL TO THE SUPREME COURT CONSTITUTES A WAIVER OF THEIR PRESENT CLAIM.

Following the decision of the New York Court of Appeals affirming their convictions and upholding the constitutionality of the sentencing provisions of the New York Drug Laws; Penal Law § 70.00(2)(a); (3)(2)(ii)(iii), against petitioners' claim of conflict with the Federal Constitution, People v. Broadie, 37 N Y 2d 100 (1975), petitioners were entitled to automatic review of that decision by appeal to the Supreme Court of the United States under 28 U.S.C. § 1257(2), which provides:

"Final judgments or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

See also Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975).

Unlike the Supreme Court's certiorari jurisdiction, which is discretionary, the Supreme Court would have "had no discretion to refuse adjudication of the case on its merits. . . ." Hicks v. Miranda, 422 U.S. 332, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication by the Supreme Court of the merits of the very claim petitioner is now presenting in this habeas corpus proceeding. Id. at 344-45.

If petitioners had taken the appeal to the Supreme Court to which they were entitled, and had received the "actual adjudication" of the claim they now present as to the constitutionality of the statutes in question, to which they were also entitled, they would now be barred from relitigating the same claim in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c), which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled." Neil v. Biggers, 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing the petitioner to obtain one federal determination" of his federal constitutional claims. United States ex rel. Radich v. Criminal Court of the City of New York, 459 F. 2d 745, 749 (2d Cir. 1972), cert. den.

sub nom Ross v. Radich, 409 U.S. 1115 (1973) (emphasis supplied).

This section provides in pertinent part:

"In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein. . . ."

Thus there can be no dispute that petitioners would not be able to come before this Court today seeking habeas corpus relief had they taken their appeals of right to the Supreme Court from the New York Court of Appeals in 1975. Had they taken that appeal they would have brought their criminal proceedings to final conclusions long ago, and would not still be litigating their federal constitutional claims in 1978.

The law mandates that the defendant in a state action exhaust his state remedies before seeking habeas corpus relief in Federal District Court. The exhaustion doctrine is set forth in 28 U.S.C. § 2254(b), which reads:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Darr v. Burford, 339 U.S. 200 (1950), held that the exhaustion of remedies in the state courts included all remedies available in the Supreme Court by appeal or writ of certiorari. Although Fay v. Noia, 372 U.S. 391 (1963), qualified and overruled Darr v. Burford to the extent that a state prisoner is not barred from federal habeas relief even though he fails to seek certiorari in the Supreme Court, the reasoning employed by the Supreme Court is not applicable where petitioner has a right of direct appeal.

"...The (certiorari) requirement of Darr v. Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes. The goal of prompt and fair criminal justice has been impeded because in the overwhelming number of cases the applications for certiorari have been denied for failure to meet the standard of Rule 19. And the demands upon our time in the examination and decision of the large volume of petitions which fail to meet that test have unwarrantably taxed the resources of this Court. Indeed, it has happened that counsel on oral argument has confessed that the record was insufficient to justify our consideration of the case but that he had felt compelled to make the futile time-consuming application in order to qualify for proceeding in a Federal District Court on habeas corpus to make a proper record." Fay v. Noia, 372 U.S. at 437.

Therefore, the principle of comity between the state and federal courts, which Darr v. Burford emphasized, was discarded by the Fay court where the only access to the Supreme Court by the habeas petitioner was by writ of certiorari. On balance, the right to speedy adjudication of a criminal claim controlled.

Comity still requires that, absent other overriding considerations, it should be the U.S. Supreme Court, rather than the Federal District or Appellate Courts which should be asked to overrule New York's Appellate Courts on the constitutionality of the New York law.

United States ex rel. McCloskey, 239 F. Supp. 419 (S.D.N.Y. 1965) addressed the issue of whether Fay v. Noia overruled Darr v. Burford when a petitioner could have proceeded by direct appeal. McCloskey, a police lieutenant, refused to answer questions in a grand jury investigation of police corruption. He was convicted of contempt and sought habeas relief, claiming that the applicable New York law which required him to execute a limited waiver of immunity or lose his job, violated his Fifth and Sixth Amendment rights. The district court, in dismissing his petition held that under Fay, it had discretion to require him to exhaust currently available Supreme Court remedies.

The exhaustion requirements "are limited in their application to those state remedies still open to the habeas applicant at the time he files his application in federal court." Humphrey v. Cady, 405 U.S. 504, 516 (1972); Fay v. Noia, 372 U.S. 391, 437-438.

People v. Broadie was decided June 18, 1975. Mosley, whose sentencing followed a guilty plea, filed for habeas corpus on July 18, 1975. McNair, who was convicted after a jury trial, filed for habeas corpus on July 16, 1975.

U.S. Sup. Ct. Rule 11, 28 U.S.C.A. provides:

"An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal . . . is filed. . . within ninety days after entry of such judgment."

The named defendant in the state case, Broadie petitioned the U.S. Supreme Court for a writ of certiorari, which was denied, 423 U.S. 950 (1975). Petitioners sought neither direct appeal to the U.S. Supreme Court nor writs of certiorari electing instead to make application for writs of habeas corpus in the Federal District Court. Although a denial of certiorari is not an adjudication on the merits, Brown v. Allen, 344 U.S. 443, 451-2, 491-2 (1953), a different rule applies where appeal lies of right as in the case at bar. Hicks v. Miranda, (supra).

Last term, in Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a subsequent federal habeas corpus proceeding. The Court held that the prisoner would be barred from presenting

that claim "absent a showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, supra, 433 U.S. at 84. The Court noted that this test was more restrictive upon the prisoner than the "deliberate bypass" test set forth in dicta in Fay v. Noia, 372 U.S. 391, 438 and expressly stated that "[i]t is the sweeping language of Fay v. Noia . . . which we today reject." Wainwright v. Sykes, supra, 433 U.S. at 87-88.

The test of Wainwright v. Sykes, supra, applies to petitioners' failure to obtain a final federal determination of his present claim from the Supreme Court on direct appeal. The Supreme Court's analysis of its holding in Sykes applies with equal or greater force to this situation even though (indeed, because) it was a federal rather than state determination which petitioner waived.

One of the Court's major reasons for its broad waiver test in Sykes was the interest in "finality in criminal litigation." Sykes, supra, at 88. That interest bears with equivalent strength upon any procedure available to the prisoner in his state litigation, including most certainly his

direct appeal to the Supreme Court. Had petitioners taken that appeal from the 1975 decision by the New York Court of Appeals their criminal litigation would have come to a complete and final conclusion long ago following the Supreme Court's disposition of the appeal. This proceeding would not be occurring today, with decision from this Court likely in 1978 and subsequent petition for certiorari likely from the losing party quite possible extending into the Supreme Court's 1978-79 Term.

The State's interest in "finality of criminal litigation" in this case, however, extends far beyond petitioners themselves. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 70.00(2)(a); 3(a)(ii)(iii), was applied. If the statute is invalidated, a serious possibility exists that the Court's decision would apply retroactively. See Hankerson v. North Carolina, 432 U.S. 233; Ivan V. v. City of New York, 407 U.S. 203 (1972). In that case the delay in the determination of the constitutional issues raised herein -- due solely to petitioner's failure to take his appeal of right to the Supreme Court -- would put New York to enormous unnecessary expense in retrying as many as hundreds of prisoners convicted in cases involving the statute in question in the period since the Supreme Court would have decided this issue on direct appeal.

Unquestionably prosecutors in New York were and are entitled to rely on the unanimous Court of Appeals decision in People v. Broadie, supra, upholding the sections of the New York Drug Law in question. If a federal court is going to overrule that decision it should have been as soon as possible, not years later. In addition, as a matter of comity, it should be the Supreme Court, rather than this Court, which should properly overrule New York's highest court if such a ruling is to occur. See United States ex rel. Lawrence v. Woods, 432 F. 2d 1072 (7th Cir. 1970) cert. den. 402 U.S. 983 (1971).

The Supreme Court in Sykes, supra, also identified as a major justification for its expanded waiver holding the interest in "making the state trial on the merits the 'main event', so to speak, rather than a 'tryout...' for what will later be the determinative federal habeas hearing." Sykes, supra at 90. That interest, too, applies with great force to this situation, since petitioners could have made their trial not merely the main event but indeed their "only appearance", so to speak, by taking their direct appeal to the Supreme Court and obtaining a federal determination of all their federal constitutional claims in the direct appeal process, thereby obviating the need for a federal habeas corpus proceeding at all.

In this case there are also important federal interests which dictate a holding that petitioners are barred from habeas corpus relief. The first is the strong federal interest in avoiding forum-shopping by state prisoners between the Supreme Court on the one hand and the lower federal courts, where ultimate review by the Supreme Court through writ of certiorari is statistically very unlikely, on the other. One can easily imagine a state prisoner or his counsel carefully weighing the Supreme Court's most recent pronouncements in the areas analogous to the prisoner's possible federal claim, comparing those decisions to the holdings of the district and circuit where he is located (or was convicted), and choosing the court most likely to look upon his claim with favor. Virtually no other litigant anywhere in the federal system has that privilege (only the foreign dignitaries to whose cases the Constitution assigns concurrent original jurisdiction to the Supreme Court and the federal district court). Certainly it should not be encouraged since it promotes inconsistency and disharmony within the federal judiciary and tends to defeat the perception of the federal courts as a unified national system.

There is also a strong federal interest present in judicial economy. Direct appeal to the Supreme Court disposes of a federal claim in one federal court in one hearing. Habeas corpus review involves dispositions by the federal district court, the court of appeals often many years after the conviction in state court and probably by the Supreme Court at least in considering if a writ of certiorari should be granted. Plenary Supreme Court review, if granted, requires a fourth round of papers and decisions. Surely this interest alone requires that a prisoner avail himself of one-step federal review or abandon his right to three or four-step review.

It is clear that the petitioners in this case cannot meet the burden placed upon them by the "cause" and "prejudice" standard of Wainwright v. Sykes, supra, and thus are barred from pursuing their present constitutional claim on habeas review. Petitioners' present counsel is the same counsel who represented them in their state appeals to the Appellate Division and the State Court of Appeals. Nowhere, has he ever suggested an explanation for his failure to appeal to the Supreme Court. It is true that this issue was not raised in this case prior to the present time, but the burden nonetheless rests upon the petitioners to demonstrate their

right to habeas review by showing the "cause" required by Sykes. If petitioners have any explanation for their failure, counsel may still tender that explanation to the Court in a responsive brief or affidavit.

However if petitioners' explanation is merely one of negligence or inadvertence on the part of their appellate counsel, that explanation is not sufficient to establish the requisite "cause". See Wainwright v. Sykes, supra at 112-116 (Brennan, J., dissenting); Gates v. Henderson, ____ F. 2d ____, 1976 Slip. Ops. 5361, 5386 and n. 6 (Oakes, J., concurring in the result) (2d Cir. August 19, 1977) (en banc).

Nor can petitioners demonstrate "actual prejudice" from the imposition of sentences under the mandatory sentencing provisions of § 70.00(2)(a) and (3)(a)(ii), (iii). Legislation* enacted in 1977 now permits Class A drug felons absolute discharge from parole on the same basis as other felons. Both Mosley and McNair are currently on parole and will be eligible for this discharge in December, 1979 and February, 1980 respectively. (See p. 22 supra)

* Amendment to Executive Law § 259-j.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DENYING THE PETITIONS FOR WRITS
OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
March 31, 1978

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellees
herein. On the 3rd day of April , 1978 , s he served
the annexed upon the following named person :

LESLIE A. BRADSHAW, ESQ.
Attorney At Law
1278 Genesee Park Blvd.
Rochester, New York 14619

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
3rd day of April , 1978

Susan D. Chieco

[Signature]
Assistant Attorney General
of the State of New York